Supreme Court, U. S.
FILED
SEP 18 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-425

VALARIE PRICE - - - - - Petitioner

versus

COMMONWEALTH OF KENTUCKY - Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE KENTUCKY COURT OF APPEALS

JOSEPH G. GLASS
118 South Fifth Street
Suite 100
Louisville, Kentucky 40202
Counsel for Petitioner

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

INDEX

	PAGE
Citations	ii
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Constitutional Provisions Involved	2–4
Statutory Provisions Involved	4
Statement of the Case	4–10
Reasons for Granting the Writ	10–25
Conclusion	25–27
Appendix A—Memorandum Opinion of the Court by Justice Jones Affirming	29
Appendix B—Court of Appeals Mandate	30

CITATIONS

Cases:

	PAGE
Branzburg v. *Hayes*, 408 U. S. 665, 688, N. 25, 92 S. Ct. 2646, 2678, 33 L. Ed. 2d 626 (1972)	17
Brinkerhoff-Faris Trust and Savings v. *Hill*, 281 U. S. 673, 74 L. Ed. 1119, 50 S. Ct. 451 (1930)	25
Cole v. *Arkansas*, 333 U. S. 196, 68 S. Ct. 514, 92 L. Ed. 644 (1948)	17
Douglas v. *California*, 372 U. S. 353, 83 S. Ct. 814, 9 L. Ed. 2d 811 (1963)	22
Draper v. *Washington*, 372 U. S. 487, 83 S. Ct. 774, 9 L. Ed. 2d 899 (1963)	22
Eversole v. *Commonwealth*, Ky., 288 S. W. 2d 58 (1956)	13
Faughn v. *Commonwealth*, Ky., 453 S. W. 2d 743 (1970)	13
Fugate v. *Commonwealth*, Ky., 215 S. W. 2d 1004, 1006 (1948)	12–13
Gaines v. *Washington*, 277 U. S. 81, 86, 48 S. Ct. 468, 470, 72 L. Ed. 793 (1928)	17
Griffin v. *Illinois*, 351 U. S. 12, at p. 18, 76 S. Ct. 585, at p. 590, 100 L. Ed. 891 (1956)	22
Hack v. *Commonwealth*, Ky., 418 S. W. 2d 216 (1967)	13
Hammershoy v. *Commonwealth*, 398 S. W. 2d 883, at p. 884 (1966)	21
Hurtado v. *California*, 110 U. S. 516, 4 S. Ct. 111, 28 L. Ed. 232 (1884)	17
Lane v. *Brown*, 372 U. S. 477, 83 S. Ct. 768, 9 L. Ed. 2d 892 (1963)	22
Lissenbee v. *Commonwealth*, Ky., 249 S. W. 782 (1923)	14
Lovan v. *Commonwealth*, Ky., 87 S. W. 2d 381, 382 (1935)	13
Mercer v. *Commonwealth*, Ky., 330 S. W. 2d 734 (1959)	13

Cases: (Cont'd)

	PAGE
Minnesota v. *National Tea Company*, 309 U. S. 551, 84 L. Ed. 920, 60 S. Ct. 676 (1940)	23–24
Perkins v. *Commonwealth*, Ky., 409 S. W. 2d 294, 296 (1966)	12
Rinaldi v. *Yeager*, 384 U. S. 305, 310-311, 86 S. Ct. 1497, 1500, 16 L. Ed. 2d 577 (1966)	22
Satterly v. *Commonwealth*, Ky., 437 S. W. 2d 929 (1969)	13
Stirone v. *United States*, 361 U. S. 212, 80 S. Ct. 270, 4 L. Ed. 2d 252 (1960)	16
Sturgill v. *Commonwealth*, Ky., 293 S. W. 2d 730 (1956)	14
Williams v. *Commonwealth*, Ky., 234 S. W. 2d 148, 149 (1950)	14
Williams v. *Oklahoma City*, 395 U. S. 458, 89 S. Ct. 1818 at 1819, 23 L. Ed. 2d 441 (1969)	22, 24

Miscellaneous:

Kentucky Revised Statutes, 433.180 (Dwelling House Breaking)	4
Kentucky Revised Statutes, 433.220 (Grand Larceny)	4

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. _____

VALARIE PRICE - - - - - *Petitioner*

v.

COMMONWEALTH OF KENTUCKY - - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE KENTUCKY COURT OF APPEALS

The petitioner, Valarie Price, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Kentucky Court of Appeals.

OPINION BELOW

The opinion of the Kentucky Court of Appeals, not yet reported, appears in the Appendix hereto.

JURISDICTION

The Judgment of the Kentucky Court of Appeals was rendered on November 22, 1974. A timely petition for rehearing was overruled on June 20, 1975. This Petition for Writ of Certiorari was filed within ninety (90) days of that date. Jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

I. Whether the conviction of the Petitioner was obtained in violation of her Constitutional rights as guaranteed under the fifth, sixth and fourteenth amendments of the Constitution of the United States in that the Commonwealth failed to prove the value of the furniture which was the subject matter of the Indictment for Grand Larceny, which failure was a fatal deficiency, and further that there was a fatal variance in the Commonwealth proof of actual ownership of the furniture, which variance failed to conform to the charges of the Indictment rendered against the Petitioner.

II. Whether a memorandum opinion of the Kentucky Court of Appeals meets the Kentucky Constitutional and statutory standards which guarantee the right of a convicted person an appeal of his conviction, and whether these Kentucky provisions, once enacted, are then governed by the due process and equal protection provisions of the Constitution of the United States, Amendment XIV, Section I, which should require equal treatment of litigation on Appellate Review.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States of America provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases

> arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the Constitution of the United States of America provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Section I of the Fourteenth Amendment to the Constitution of the United States of America provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 109 and 127 of the Constitution of the Commonwealth of Kentucky provide that:

> The judicial power of the Commonwealth both as to matters of law and equity, shall be vested in the senate when sitting as a court of impeachment, and one supreme court (to be styled the court of appeals) and the courts established by this Constitution. (§109)
>
> The right to appeal or sue out a Writ of error shall remains as it now exists until altered by law, hereby giving to the general assembly the power to change or modify said right. (§127)

STATUTORY PROVISIONS INVOLVED

The Kentucky Revised Statutes, Section 21.135 provides that:

> The court must deliver written opinions in all cases.

STATEMENT OF THE CASE

On July 26, 1973, the Jefferson County Grand Jury charged the Petitioner, Valarie Price, an Indiana resident, with violations of K.R.S. 433.180 (Dwelling House Breaking) and/or K.R.S. 433.220 (Grand Larceny). Count One of the Indictment alleged that the Petitioner broke and entered the dwelling house of Edith White on May 29th and 30th, 1972, with the intent to steal. Count Two alleged that on the same dates the Petitioner "stole three rooms of furniture worth over $100.00 belonging to Edith White." (Transcript of Record, p. 2).

The Petitioner appeared in Court on December 13, 1973, and was allowed to remain free upon her own bond. The matter was subsequently set for trial on April 2, 1974. Trial was held on that date (T.R., pp. 3-4).

The Commonwealth called Edith White, who testified that on May 29 and 30, 1972, she lived on Wendell Avenue, Louisville, in a house which was rented from the Petitioner, Valarie Price (Transcript of Proceedings and Testimony, pp. 16, 17). Mrs. White testified that she left the premises on May 28, 1972, to visit her mother in Elizabethtown, Kentucky, and returned on May 31, 1972, and found her belongings gone (T.P., pp. 18-20, 29). She acknowledges that she was in the process of moving out of the premises at the time and that she had her furniture and other items almost packed for moving (T.P., pp. 19-20). Mrs. White's testimony was that she was moving by agreement with the Petitioner because she was behind in her rent and was not presently able to pay her rent (T.P., pp. 20, 23).

Responding to a question by the Commonwealth's Attorney as to what furniture was in the Wendell Avenue premises on May 28, 1972, Mrs. White, over the trial counsel's objection, was allowed to read from a list that contained not only items of furniture, but also a multitude of other items, e.g., toys, china, linens, books, rings, furs, luggage, clothing, records, electronic equipment and wigs; these examples are only some of the items other than furniture that were introduced as being missing from the premises (T.P., pp. 30-32). Mrs.

White did not specifically establish any value for any furniture, either individually or collectively, but she did testify that the total value she placed upon the list of items that she read to the Court and jury was $14,954.17, which value was also objected to by trial counsel (T.P., p. 35). Also, the list itself was never made a part of the record as an exhibit.

In concluding the direct examination, Mrs. White testified that she initiated the proceedings against the Petitioner on the basis of information that she had received from other people (T.P., pp. 42 and 43).

On cross-examination, Mrs. White acknowledged that she did not even compile the list of personalty which she testified from, until about March of 1973, some ten (10) months or so after the alleged offense (T.P., p. 60).

Sara Sexter, a neighbor of Edith White, was called next to testify on behalf of the Commonwealth. Mrs. Sexter testified that she saw the Petitioner and another older woman come to the Wendell Avenue address in Mrs. Price's Volkswagon, along with two (2) men in a truck. She initially testified that she saw the men bringing clothes out of the house (T.P., p. 75). Mrs. Sexter subsequently testified that Mrs. Price was helping the men carry clothes (T.P., p. 84). There were several questions asked of Mrs. Sexter concerning the carrying out of furniture (T.P., pp. 75, 85). Her responses to the questioning about the moving of furniture were not clear, and neither the direct nor cross-examiners pursued the point for clarity (T.P., pp. 75, 85).

In any event, Mrs. Sexter did not designate any specific items being taken from the house except clothing (T.P., pp. 75, 84, 85).

Another neighbor, Sue Ann Adams, testified that she was looking out of a window of her home and saw the Petitioner "and several other people moving furniture from the house into the van." She did not testify about either the quantity or the quality of the furniture which she saw moved (T.P., p. 89). Moreover, she stated that even though she had been in Edith White's as a babysitter on several occasions, she could not identify any of the furniture or possessions (T.P., pp. 92, 93).

Chris Adams, Sue Ann's sister, was also called as a witness. She testified that she saw the Petitioner and some men in a truck, but that she did not see any furniture taken or moved (T.P., pp. 100, 101).

The last witness called on behalf of the Commonwealth was La Fon White, who identified herself as the former mother-in-law of Edith White (T.P., p. 108). She testified that some of the furniture in Edith White's possession at the time of the alleged theft actually belonged to her (La Fon) (T.P., p. 109). Mrs. La Fon White testified that she went to the petitioner's house (in Indiana) on May 30, 1972, which would have been the day before Mrs. Edith White returned to Louisville from Elizabethtown (T.P., p. 110). La Fon White stated that she saw some of "the furniture" on Mrs. Price's patio. According to the testimony, she saw a color television, a home-made cedar chest, a pink-painted, antique heirloom rocker, and an orange chair (T.P., p. 110).

BEST COPY AVAILABLE

On cross-examination, La Fon White testified that she talked to Mrs. Price and further that Mrs. Price admitted taking it (the property described as being on the patio) (T.P., pp. 111, 112). She said that she could not know, for a fact, whether the television was the one in possession of her former daughter-in-law, but was sure about the other three (3) pieces (T.P., pp. 112, 113). La Fon White did not testify about the value of these pieces of furniture, either individually or collectively.

This testimony concluded the case for the Commonwealth, after which the trial counsel made a Motion to Dismiss and a Motion for a Directed Verdict, both of which were overruled (T.P., pp. 122, 123).

Valarie Price, testifying in her own behalf, advised that she was in the real estate and insurance business and that she owned eleven (11) pieces of commercial rental property in Kentucky and Indiana (T.P., pp. 124, 125, 126). She testified that the Wendell Avenue property was rented to Edith and Andrew White in August or September of 1971 (T.P., p. 127). Additionally, Mrs. Price testified that she had rented the Wendell Avenue property partially furnished with a couch, beds, and bedroom furniture (T.P., p. 130).

It was Mrs. Price's testimony that she had sent Edith White three (3) letters directing Mrs. White to vacate, and personally delivered yet another letter about May 20, 1972 (T.P., p. 132).

Mrs. Price advised the Court and jury that she rented the Wendell Avenue property to Kenneth Plummer as of June 1, 1972, and further that she was

at the Wendell Avenue address on June 1 and 2, 1972, during two of the days that the Plummers moved into the property (T.P., pp. 135, 137). She denied removing any of Edith White's property from the premises. Moreover, she testified that she had keys to the property and that none of the locks had been changed at the location, to her knowledge (T.P., p. 138).

On cross-examination, Valarie Price denied ever seeing La Fon White (T.P., p. 140). She further reaffirmed that she did not take Edith White's property (T.P., p. 141).

Louis Huff, a retired businessman, testified that he was with Valarie Price on May 29 and 30, 1972, from "up in the morning" until "quite late" looking for a farm for Mr. Huff to purchase. He stated that he had engaged Mrs. Price, in her real estate capacity, to find him a farm in southern Indiana. Huff testified that they would look at farms until "quite late," have supper and discuss the day's events and that he returned home about 10:00 or 11:00 o'clock at night (T.P., p. 146). In response to a question about whether Mrs. Price could have been at the property on Wendell Avenue, Louisville, Mr. Huff responded "No sir . . . She was with me" (T.P., p. 147).

There was no cross-examination of Mr. Huff.

Thereafter, the Trial Court instructed the jury, which included instructions concerning Dwelling House Breaking and Grand Larceny. The Court further instructed the jury that Valarie Price could not be found guilty on both charges (T.P., pp. 147-151).

The jury returned a verdict of guilty as to the Grand Larceny charge and fixed punishment at confinement in the penitentiary for a period of two (2) years (T.P., p. 163).

The Kentucky Court of Appeals affirmed petitioner's conviction on November 22, 1974. Within the required period prescribed, a Petition for Reconsideration was filed with that Court, praying for a reconsideration of the issues presented and further raising the Constitutional question involving the issuance of Memorandum Opinions. The petition was overruled on June 20, 1975.

REASONS FOR GRANTING THE WRIT

I. The July, 1973 Jefferson County Grand Jury charged the petitioner, Valarie Price, with the offenses of Dwelling House Breaking and/or Grand Larceny (T.P., p. 2). More specifically, the charges were recited as follows:

COUNT ONE

That on or about the 29th and 30th days of May, 1972 in Jefferson County, Kentucky, the above named defendant broke and entered the dwelling house of Edith White with intent to steal.

and/or

COUNT TWO

That on or about the 29th and 30th days of May, 1972, in Jefferson County, Kentucky, the above named defendant stole three rooms of furniture worth over $100.00 belonging to Edith White.

At the trial of this matter, the Commonwealth called five (5) witnesses to testify concerning the alleged offenses. These witnesses were Edith White, the person who had possession of the premises which were the subject of the Indictment; Sara Sexter, Sue Ann Adams and Chris Adams, friends and neighbors of Edith White who stated they had seen Vararie Price at Edith White's home about the time the offenses were supposed to have occurred; and finally La Fon White, the former mother-in-law of Edith White, who, according to her testimony, saw four (4) pieces of furniture on the petitioner's home patio, three (3) pieces of which she firmly believed to have come from the home of Edith White.

Since Valarie Price had acknowledged being at the Wendell Avenue premises on June 1 and 2, 1972, assisting the moving in of the Kenneth Plummers, there is no real need or advantage to belabor the questioned dates involved in the Sexter or Adams testimony (T.P., pp. 135, 137).

Trial counsel, by his two (2) objections concerning the list of items read by Edith White and the total value which she had placed upon these items, had the effect of notifying the Commonwealth Attorney and the Trial Court of a fatal deficiency in the Commonwealth's proof of their case on the Grand Larceny charge involving the theft of three rooms of furniture valued at over $100.00, as stated in Count Two of the Indictment (T.P., pp. 30, 35). Yet even after these matters were called to the attention of the Court and Commonwealth, the error was not corrected by any

specific proof of the particular value of the furniture in question. The Commonwealth had the opportunity, then and there, to ask the witness what specific values she placed upon the particular items of furniture or what specific value she placed upon the loss of the furniture as a whole or grouping. Even though the Trial Court advised trial counsel that he had a right to cross-examine (T.P., p. 35) Edith White concerning the value question, it was not incumbent upon trial counsel to assist the Commonwealth in its efforts to secure a conviction.

The list itself, by its inclusion of items totally unrelated to the language of the Indictment was prejudicial to the petitioner because it went beyond the charges and because of its inflamatory nature which could arouse the passions and prejudice of the jury.

In *Perkins* v. *Commonwealth,* 409 S. W. 2d 294, 296 (1966), the Kentucky Court stated that the Commonwealth has a duty to establish value at the time and place of theft. Also, in *Fugate* v. *Commonwealth,* 215 S. W. 2d 1004, 1006 (1948) the Kentucky Court ruled that evidence which is at variance with an indictment should be excluded from the proof. In *Fugate, supra,* the defendant was indicted for the stealing and carrying away of "goods, wares, merchandise, and other articles including clothes." The Commonwealth, at trial, introduced testimony involving the taking of $1,500.00, to which the defendant objected. In discussing the variance of proof question the Court of Appeals observed that "It would have been easy indeed

to have included in the indictment the term 'currency,' and thus eliminated this question" (p. 1006).

In *Lovan* v. *Commonwealth,* 87 S. W. 2d 381, 382 (1935), the Kentucky Court of Appeals held that the value of property, which was named in a grand larceny indictment must be alleged and proved. The value of property was described as "an essential ingredient" (p. 382).

Kentucky cases upholding convictions or otherwise discussing question involving the proof value are, of course, numerous. Included in these are *Faughn* v. *Commonwealth,* 453 S. W. 2d 743 (1970); *Satterly* v. *Commonwealth,* 437 S. W. 2d 929 (1969); *Hack* v. *Commonwealth,* 418 S. W. 2d 216 (1967); *Mercer* v. *Commonwealth,* 330 S. W. 2d 734 (1959); and *Eversole* v. *Commonwealth,* 288 S. W. 2d 58 (1956). The petitioner cites these cases because they exemplify the Kentucky Court's discussions and requirements that value be proven in some adequate manner that does not leave proof open to question or speculation or parenthetically, prejudice or passion. The petitioner urges that the Kentucky Court of Appeals did not even consider or follow its own law when it decided this case.

In the Commonwealth's efforts to sustain a conviction against Valarie Price for the crimes charged, they called upon Edith White and her former mother-in-law, La Fon White, to testify about the furniture which was the subject matter of the Grand Larceny Indictment.

As recited heretofore, Edith White read a long list of items which she said was on her property on May 28, 1972, and not there when she returned on May 31,

1972 (T.P., pp. 30-32). However, of substantial importance is the fact that she also testified that her mother-in-law (La Fon White) was holding a lien on the furniture (T.P., p. 109). La Fon White was more emphatic. She testified that some of the furniture in the Wendell Avenue property specifically belonged to her and her mother. She was specific about an organ and a washing machine, but alluded to yet other furniture (T.P., p. 109).

In *Williams* v. *Commonwealth,* 234 S. W. 2d 148, 149 (1950), the Kentucky Court held that there was a fatal variance in the proof of ownership between the evidence and the assertions of the indictment and further that the defendant's motion for a directed verdict should have been sustained. In further support of this issue, the petitioner calls this Court's attention to *Sturgill* v. *Commonwealth,* 293 S. W. 2d 730 (1956), and *Lissenbee* v. *Commonwealth,* 249 S. W. 782 (1923), all Kentucky cases.

The Commonwealth chose the witnesses to present for trial, and, presumably, through pretrial interviews, they knew what the testimony would be. Consequently, the Commonwealth was in a position to insure that its proof would conform to the charges. Yet, by the proof adduced, through Edith White and La Fon White, there is no way of telling what furniture, if any, was the real subject matter of the indictment. Such considerations are not for the province of the jury. Ownership of property was an essential element of the Grand Larceny indictment and the Commonwealth, through its own witnesses left the question of ownership of the various pieces of furniture completely to chance decision.

It is the petitioner's contention and belief that the conviction herein was obtained in violation of certain guarantees embodied within the Fifth, Sixth and Fourteenth Amendments of the Constitution of the United States of America.

The Fifth Amendment of the United States Constitution provides in part that "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, . . ."

The Sixth Amendment of the United States Constitution provides in part that "In all criminal prosecutions the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation . . ."

The Fourteenth Amendment of the United States Constitution provides in part that ". . . nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

In the matter herein, the petitioner was indicted by the Jefferson County Grand Jury on charges of Dwelling House Breaking and/or Grand Larceny (T.P., p. 2). With regard to the crime of Grand Larceny, the Jefferson County Grand Jury charged that the petitioner stole three rooms of furniture belonging to Edith White, valued over $100.00. At trial,

the Commonwealth neither limited its proof to the question of three rooms of furniture nor did it limit its proof to furniture belonging specifically to Edith White. As has been argued heretofore, the Commonwealth was allowed, over the Petitioner's objection, to set about to prove the larceny of items other than and in addition to the furniture charged in the indictment (T.P., pp. 30-32). Additionally, the Commonwealth, over petitioner's objection, was allowed to let its prosecuting witness, Edith White, testify about a total value of all items allegedly taken from her, instead of specifically limiting the proof to what was charged in the indictment, i.e., furniture (T.P., p. 35). Moreover, the prosecutor introduced the testimony of both Edith White and La Fon White which raised a serious question about the real ownership of the property which was the subject matter of the indictment (T.P., pp. 61, 109). There was never any delineation of what particular property belonged to whom.

In matters prosecuted in Federal Court, the defendant has an absolute right to have prosecutions limited specifically to charges contained in an indictment brought about by a Grand Jury. It is error for the government to set about to prove any charges which are outside of the indictment. *Stirone* v. *United States,* 361 U. S. 212, 80 S. Ct. 270, 4 L. Ed. 2d 252 (1960). Petitioner recognizes that *Stirone, supra,* is limited specifically to federal prosecutions.

Petitioner further recognizes that the various states, through either the Fifth, Sixth or the Fourteenth Amendments to the United States Constitution,

are not yet required to utilize Grand Juries for the initiation of criminal proceedings. *Hurtado* v. *California,* 110 U. S. 516, 4 S. Ct. 111, 28 L. Ed. 232 (1884); *Gaines* v. *Washington,* 277 U. S. 81, 86, 48 S. Ct. 468, 470, 72 L. Ed. 793 (1928); *Branzburg* v. *Hayes,* 408 U. S. 665, 688, N. 25, 92 S. Ct. 2646, 2678, 33 L. Ed. 2d 626 (1972). However, it is urged that when the states do utilize a grand jury, as Kentucky, then any prosecution subsequent to a grand jury indictment must stay within the confines of the subject matter of the indictment as returned by the grand jury. It is further urged that the Fifth and Sixth Amendments proscriptions concerning indictments and charges are binding upon the states through application of the Fourteenth Amendment, when the state elects to proceed by the grand jury procedure.

In *Cole* v. *Arkansas,* 333 U. S. 196, 68 S. Ct. 514, 92 L. Ed. 644 (1948), this Court, at p. 517, stated that

> No principle of procedural due process is more clearly established than that notice of the *specific charge,* and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal. In re Oliver, 333 U. S. 257, 68 S. Ct. 499, and cases there cited . . . It is as much a violation of due process to send an accused to prison following convictions of a charge on which he was never tried as it would be to convict him in a change that was never made. De Jonge v. State of Oregon, 299 U. S. 353, 362, 57 S. Ct. 255, 259, 81 L. Ed. 278.

In the matter herein, Valarie Price was subjected to a prosecution which went well beyond the subject matter of the Grand Jury's charge, both as to the topic of furniture and as to the question of ownership. These variances of proof greatly affected and prejudiced her substantial Constitutional rights as an accused.

Not only did the Commonwealth fail to prove specifically any value of the furniture testified about by either Edith White or La Fon White, the Commonwealth also failed to establish specific ownership of the property testified about during the trial. The Commonwealth chose its witnesses and its method and manner of proof. Consequently, it should be bound by its errors.

II. Further, the petitioner believes that a very fundamental question of due process and equal protection of law is presented by this Petition, concerning the issuance of Memorandum Opinions. Even though this Court has never held that the several states must provide appellate review to person convicted of crimes, this Court has held that when a state does assume this responsibility, it must not discriminate in its process. Petitioner urges that one or two sentence memorandum opinions fall significantly short of the due process of law which should be afforded a litigant on appellate review, particularly where that review has been established by state constitution and state statute, as in the matter herein.

The petitioner is not urging that such opinions must be either verbose or of a particular minimum length.

It is urged, however, that due process and equal protection of law and the Kentucky Constitution and Statute does require that an opinion contain sufficient information and law to inform the litigants of the reasoning for the Court's decision. An opinion of the type described will then allow the litigants to know, with at least reasonable certainty, what facts and law the appellate court utilized in making its determination.

The questiton presented here is aparently troubling the Commission on Revision of the Federal Court Appellate System, 209 Court of Claims Building, 717 Madison Place, N.W., Washington, D. C. 20005. That Commission, established by Public Law 92-489, 92d Congress, 1972, and chaired by Senator Roman L. Hruska, with Judge J. Edward Lumbard, Vice Chairmain, has sent questionnaires to practitioners of the United States Courts of Appeals for the Third, Fifth and Sixth Circuits, which contain very pertinent questions about the need or desire for federal appellant opinions. Petitioner believes that the very fact of the existence of this Commission and its questionnaire points up the timeliness of the Petitioner's Question and the need for a resolution of the issue by this Honorable Court.

The Petitioner recognizes that the Kentucky Court has a substantial number of cases presented to it each year for appellate review, and further that this case load increases annually. Moreover, the petitioner further recognizes that the number of Judges, Commissioners and legal assistants has not increased in any

substantial proportion, let alone proportionately with the increased litigation. However, it is submitted that the increased casework does not justify the reducing of standards for appellate opinions.

The Constitution of Kentucky, in §127, provides for the right of appeal to the Kentucky Court of Appeals. Moreover, K.R.S. 21.135 provides that the Court of Appeals must deliver written opinions in all cases. Petitioner asserts that the statutory and constitutional requirements have not been met when the Court renders an opinion which merely states, They have reviewed the record and find no prejudicial error, as in the matter herein. The petitioner believes that K.R.S. 21.135, requiring written opinions, intended the opinion to express certain minimal considerations, guidelines and law utilized by the Court in making its findings. This requisite should be particularly true in opinions delivered in criminal matters, since an individual's liberty often is at stake. In matters involving contracts, torts, custody, marital dissolutions, workman's compensation claims, land condemnations and some criminal matters, the Kentucky Court renders detailed opinions about the litigation.

It would seem that an Opinion itself would be the least difficult part of appellate review. It should be assumed that the Appeals Court reads the Transcript of Record, the Transcript of Evidence, and the briefs of appellant and appellee. Further, it should be assumed that after a review of the facts and issues of law involved in the case, the appellate court then does some research of its own on the law raised by the litigants. Consequently, it is difficult to comprehend how the Kentucky Court would be faced with much more additional work in formulating an opinion, utilizing the research of the litigants and its own independent research.

On waiver of jury, a trial court has an obligation to render a written opinion supporting its findings of fact and conclusions of law. This is done after consideration of the evidence and the law, and usually through the assistance of counsel for the litigants who have often filed briefs. Petitioner suggests that the present matter is very much analogous to the bench trial. The standards should be no less important on appeals.

Petitioner believes that Memorandum Opinions of the nature contested herein, at best, allow for hurried review of criminal cases. It is further submitted that justice would be better served if the standards in criminal appellate review were equal to the standards utilized in civil appellate review. Petitioner believes due process and equal protection of the law requires as much. Petitioner recognizes that it may be "an onerous obligation" but he believes that "our profession is saddled with it nevertheless" (Quoted out of context from Judge Palmore's opinion in *Hammershoy* v. *Commonwealth*, Ky., 398 S. W. 2d 883, at p. 884 (1966).

If a defendant is to stand convicted, and appellate review is provided for by State Constitution and Statute, he should be entitled to know the reasoning of the Court, particularly after he and/or his attorney has

expended considerable time in the preparation of the appeal. Here again, it would seem that the preparation of the Opinion itself would represent only a minimal portion of the total time spent on the appellate review of the case.

Petitioner, as stated earlier, recognizes that "a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all." *Griffin* v. *Illinois,* 351 U. S. 12, at p. 18, 76 S. Ct. 585, at p. 590, 100 L. Ed. 891 (1956). However, this Court has determined that once avenues of appellate review have been established by the States, "These avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts." *Griffin* v. *Illinois, supra; Douglas* v. *California,* 372 U. S. 353, 83 S. Ct. 814, 9 L. Ed. 2d 811 (1963); *Lane* v. *Brown,* 372 U. S. 477, 83 S. Ct. 768, 9 L. Ed. 2d 892 (1963); *Draper* v. *Washington,* 372 U. S. 487, 83 S. Ct. 774, 9 L. Ed. 2d 899 (1963); *Rinaldi* v. *Yeager,* 384 U. S. 305, 310-311, 86 S. Ct. 1497, 1500, 16 L. Ed. 2d 577 (1966); *Williams* v. *Oklahoma City,* 395 U. S. 458, 89 S. Ct. 1818 at 1819, 23 L. Ed. 2d 441 (1969).

It is further recognized that these cases involve transcripts on appeal, as in *Griffin, Draper,* and *Williams, supra;* counsel on appeal, as in *Douglas* and *Lane, supra;* and indiscriminate enforcement of statutes requiring payment of costs as in *Rinaldi, supra.* However, petitioner urges that one or two sentence Memorandum Opinions also take the form of a denial of due process of law as well as a denial of equal protection of the law, particularly so under the Kentucky Constitution and legislative enactments.

The initial issue on appeal before the Kentucky Appeals Court involved the sufficiency of the evidence and whether the trial court erred in allowing the case to be submitted to the jury.

On appeal the petitioner contended that the trial judge had a great duty to scrutinize the state's evidence, particularly because of the lack of substance of the Commonwealth's proof. Many variances and inconsistencies in the state's witnesses were discussed in the brief. Petitioner contends that her's was not a usual or run-of-the-mill type of appeal, usually designated as being frivolous.

In *Minnesota* v. *National Tea Company,* 309 U. S. 551, 84 L. Ed. 920, 60 S. Ct. 676 (1940), at p. 557, this Court stated:

> It is important that this Court not indulge in needless dissertations on constitutional law. It is fundamental that sate courts be left free and unfettered by us in interpreting their state constitutions. *But it is equally important that ambiguous or obsecure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action.* Intelligent exercise of our appellate powers compels us to ask for the elimination of the obscurities and ambiguities from the opinions in such cases. Only then can we ascertain whether or not our jurisdiction to review should be invoked. Only by that procedure can the responsibility for striking down or upholding state legislation be fairly placed. For no other course assures that impor-

> tant federal issues, such as have been argued here, will reach this Court for adjudication; that state courts will not be the final arbiters of important issues under the federal constitution; and that we will not encroach on the constitutional jurisdiction of the states. This is not a mere technical rule nor a rule for our convenience. It touches the division of authority between state courts and this Court and is of equal importance to each. Only by such explicitness can the highest courts of the states and this Court keep within the bounds of their respective jurisdictions. (Emphasis added.)

Opinions are rendered in most, if not all, civil actions and in *some* criminal actions in Kentucky. Petitioner believes that the due process and equal protection of the law requires that his litigation should receive treatment that is equivalent to other cases presented to the Kentucky Court on appeal As argued earlier, the Opinions need not be lengthy, but they should include the Court's reasoning for the decision. For example, in *Williams* v. *Oklahoma City, supra,* the Per Curiam Opinion is barely two (2) pages in length, but it does a commendable job of reciting the applicable facts and law. The opinion process should provide the litigant with enough information to be able to understand the answers to the question or questions raised on appeal. Memorandum Opinions leave the issues still to be pondered, with a continued begging of the question or questions.

Another point worthy of mention is the fact that litigants have additional avenues available through appeals or Petitions of Certiorari to this Court, as well

as Petitions for Writ of Habeas Corpus into the Federal Courts. Many litigants avail themselves of these legal avenues, perhaps too many. However, Memorandum Opinions afford these respective Courts no foundation to consider the merits of such petitions or appeals. It would seem that Court of Appeals decisions, briefly reciting the facts and/or law utilized by the Court, would be a tremendous aid to those respective Courts in determining whether to consider a petition or appeal. Moreover, such Opinions could probably reduce further litigation by satisfying the questions or issues presented.

Anticipating that the State of Kentucky may challenge Petitioner's claim that the federal question involved here was not presented initially on direct appeal because it was presented by way of a Petition for Rehearing, the Petitioner calls the Court's attention to *Brinkerhoff-Faris Trust and Savings* v. *Hill,* 281 U. S. 673, 74 L. Ed. 1119, 50 S. Ct. 451 (1930), wherein a major question for consideration by this Court was originally raised by way of a petition for rehearing.

CONCLUSION

The United States Constitution provides that an accused has the right to know the substance of the charges placed against him or her. Implicit, in this right, is the principle that, once charged, the government will conform any proof that it may utilize to the accusations of the indictment. The principle seems so basic or fundamental that it seems almost axiomatic that a prosecuting government would be constrained to formulate its

proof in any other way. Yet, the Commonwealth of Kentucky did just that. Through its own witnesses, the Commonwealth failed to prove either the value or the ownership of the furniture charged to have been stolen by the petitioner. If any ingredients are essential to such a conviction for Grand Larcency, it would certainly seem these two are a must—constitutionally, as well as realistically. The Commonwealth of Kentucky had a constitutional duty to prove value and ownership of the furniture in question before they were entitled to secure any conviction. They failed in this duty and therefore the conviction herein should be reversed by this Honorable Court as being violative of the petitioner's Fifth, Sixth and Fourteenth Amendment rights as guaranteed her.

Moreover, the Kentucky Constitution creates an appellate court and further provides for appellate review. The Kentucky Legislature has provided that the appellate court shall render written opinions in all cases. The petitioner, Valarie Price, believes that the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution should be invoked in the matter herein to require that appellate opinions of the Kentucky Court of Appeals should contain at least the legal reasoning the Court utilized in arriving at a particular decision. The petitioner is not suggesting that the opinions must be lengthy, or that they must be reported, only that the opinions contain legal substance.

Ironically, the petitioner knows of no case where the Kentucky Court has reversed a conviction utilizing a

one sentence opinion—or even a short paragraph opinion, for that matter. Neither the public, nor the various state's attorneys would long tolerate that type of situation or opinion. Why, then, should the standards be any different for affirmances of convictions?

Unquestionably the workload of the Kentucky Court has increased substantially since the 1891 Kentucky Constitution established the present court system. As a matter of fact, the source of Court Appellate section was an earlier Kentucky Constitution adopted in 1850. In any event, the law should not tolerate a reduction in the standards for appellate litigation, which standards should include the need for a form of written opinion which contains some legal substance. If the caseload is tremendous, then it would seem under the Kentucky system that legal provisions and money appropriations should be made to provide for an adequate system, rather than having the risk that appellate matters be slighted or given only hurried attention.

The petitioner believes that the questions presented by this Petition are of such importance to the proper administration of justice that this Court should accept jurisdiction and issue a Writ of Certiorari to reveiew the Opinion of the Court of Appeals of the Commonwealth of Kentucky.

Respectfully submitted,

JOSEPH G. GLASS
118 South Fifth Street
Suite 100
Louisville, Kentucky 40202
Counsel for Petitioner

APPENDIX

APPENDIX A

COURT OF APPEALS OF KENTUCKY

RENDERED: NOVEMBER 22, 1974

File No. 74-693

VALARIE PRICE - - - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

Appeal from Jefferson Circuit Court
Honorable John P. Hayes, Judge
Indictment No. 149733

MEMORANDUM OPINION OF THE COURT BY JUSTICE JONES—AFFIRMING
(Not to be cited as authority)

The appellant was convicted of grand larceny and sentenced to serve two years in the penitentiary. We have carefully considered the grounds urged for reversal of the conviction and conclude that none of them requires reversal of the judgment.

We find no prejudicial error; the judgment is affirmed.

All concur.

Attorney for Appellant:
JOSEPH G. GLASS
425 South Fifth Street
Suite 201
Louisville, Kentucky 40202

Attorneys for Appellee:
Ed W. Hancock, Attorney General
Robert W. Riley, Asst. Atty. General
Capitol Building
Frankfort, Kentucky 40601

APPENDIX B

COURT OF APPEALS OF KENTUCKY

74 Term—Nov. 22, 1974

VALARIE PRICE

v.

COMMONWEALTH OF KY.

Appeal from a judgment of the Jefferson Circuit Court Ind. # 149733, File # 74-693

MANDATE

The Court being sufficieutly advised, it seems there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed; which is ordered to be certified to said court.

It is further considered that the appellee recover of the appellant its cost herein expended.

A copy—Attest:

(s) FRANCES JONES MILLS, C. C. A.
By....., D. C.

Issued June 20, 1975
Appellant's Petition for Rehearing Denied 6-20-75